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In the Supreme Court of the United States

OCTOBER TERM, 1993

BANCO COOPERATIVO DE PUERTO RICO, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under Puerto Rico law, the FDIC, as the first judgment creditor to attach assets, gains priority over the petitioner, where the petitioner claims an interest in the assets but failed to attach.

2. Whether this Court should review petitioner's claim that the FDIC acted in bad faith in attaching the assets where petitioner's claim is both untimely and unsupported by the record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-25a) is reported at 996 F.2d 493. The opinion of the district court (Pet. App. 28a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on June 24, 1993. A petition for rehearing and suggestion for rehearing en banc was denied on August 27, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on November 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, former stockbroker Miguel Serrano Arreche (Serrano) was convicted in the United States

District Court for the District of Puerto Rico of wire and mail fraud, as well as violations of other federal criminal statutes, in connection with his dealings with Citibank and Home Federal Savings and Loan Association of Puerto Rico (Home Federal). Pet. App. 5a. Serrano was the "mastermind of a multimillion dollar fraud" (*ibid.*) that particularly damaged Home Federal, a Puerto Rico thrift. Home Federal was declared insolvent and placed in receivership with the Federal Savings and Loan Insurance Corporation (FSLIC) in 1984.

The district court determined Home Federal to be a victim of embezzlement by Serrano, and ordered restitution to the FSLIC, as Home Federal's successor, in the amount of almost $3 million. Resp. C.A. Br. 5. The district court appointed a trustee for Serrano's property and enjoined all persons from prosecuting any action that might affect his property. His only significant assets were 32,400 shares of Bayamón Federal Savings Bank stock. Pet. App. 6a.

The FSLIC also replaced Home Federal in this civil case, which was ongoing in the United States District Court for the District of Puerto Rico at the time of Serrano's conviction. This action was initiated in 1984 by the Municipality of Ponce against various defendants, including Home Federal, Shearson Lehman Brothers, Inc. (Shearson), and Serrano. Home Federal had cross-claimed against Serrano and Shearson, among others. Pet. App. 5a-6a. On December 10, 1985, the FSLIC filed amended cross-claims against those parties. The FSLIC ultimately settled its claims with Shearson in November of 1988, but continued to pursue its claims against Serrano. *Id.* at 29a.

In September, 1987, Serrano filed a Chapter 11 bankruptcy petition, which triggered the automatic stay provision, 11 U.S.C. 362. Pet. App. 30a. Upon the filing of Serrano's petition, the stock held in trusteeship in the criminal action was transferred to the bankruptcy court. Resp. C.A. Br. 8-9; Pet. App. 6a & n.2. On January 13, 1989, pursuant to a motion by the FSLIC, the bankruptcy court lifted the automatic stay, which permitted the FSLIC to pursue its claims in the instant litigation against Serrano. Pet. App. 30a. In April, 1989, the bankruptcy court ordered Serrano's stock sold and the proceeds deposited with the bankruptcy court as property of the estate. *Id.* at 6a-7a.

In the current action, the district court entered a default judgment on October 16, 1989, in favor of the Federal Deposit Insurance Corporation (FDIC), successor to the FSLIC,[1] in the amount of $44,265,241 on its cross-claim against Serrano. Pet. App. 6a. On May 16, 1990, the bankruptcy court, acting on a prior FSLIC motion, dismissed Serrano's bankruptcy petition; on that same day, the FDIC moved for attachment and execution in the district court for satisfaction of its judgment against Serrano. *Id.* at 30a. On May 17, 1990, the district court issued the writ of attachment, and on July 10, 1990, the proceeds from the sale of Serrano's stock (approximately $560,000) were tendered to the district court clerk. *Id.* at 8a, 30a. On July 13, 1990, the FDIC moved for

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[1] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 401-402, 103 Stat. 183, abolished the FSLIC and made the FDIC the FSLIC's successor in interest.

disbursement of the attached funds; the district court granted the FDIC's motion on August 10, 1990. *Ibid.*

2. On August 20, 1990, petitioner Banco Cooperativo de Puerto Rico, which had never been a party to the present action, intervened and submitted numerous motions asserting a "preference" under Puerto Rico law to the funds attached by the FDIC. Pet. App. 38a-39a. Petitioner claimed to have sued Prudential Bache Securities, Inc. (Prudential), in Puerto Rico state court in 1984 for embezzlement committed by Serrano while he was employed by Prudential in 1980. Petitioner claimed that it ultimately obtained a judgment against Serrano in September 1987 for $295,000. *Id.* at 9a.[2] As the court of appeals noted, however, petitioner "never executed the judgment, attached the funds that are the subject of this [case], or otherwise obtained a lien on any of Serrano's property." *Id.* at 20a. Even though the FDIC had already attached Serrano's property and petitioner had failed to do so, petitioner claimed a statutory preference to the proceeds of the stock sale. *Id.* at 39a. Petitioner maintained that Puerto Rico Civil Code §§ 1821-1825, P.R. Laws Ann. tit. 31, §§ 5191-5195 (1990), grant preference to judgments prior in time, notwithstanding any prior attachment of the property subject to the judgment.[3] Pet. App. 39a-40a.

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[2] Petitioner had attempted, in 1987, to attach Serrano's stock, then held in trusteeship in the criminal action, but was barred by the district court's injunction. Resp. C.A. Br. 8.

[3] Title 31, P.R. Laws Ann. § 5191 (1990), provides that "[c]redits shall be classified for their graduation and payment in the order and manner specified in this chapter." Title 31, P.R. Laws Ann. § 5194 (1990) provides in part:

The district court stayed disbursement pending its ruling on petitioner's motion.[4]

3. On March 6, 1992, the district court rejected petitioner's claim. Pet. App. 41a. The district court relied on *Oronoz & Co.* v. *Alvarez*, 23 P.R.R. 497 (1916), in which the Puerto Rico Supreme Court declared that, between judgment creditors, the first to attach has priority, and that this rule is unaffected by the Puerto Rico Civil Code. *Id.* at 500. The district court also followed *Puerto Rico Bedding Mfg. Corp.* v. *Herger*, 91 P.R.R. 503, 507 (1964), in which the Puerto Rico Supreme Court again acknowledged that the first creditor to attach has preference. Accordingly, the district court ruled that petitioner's claimed preference lacked merit under Puerto Rico law. Pet. App. 38a-41a.

The court of appeals affirmed. Pet. App. 3a-25a. The court agreed with the district court that the

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With regard to all other personal and real property of the debtor, preference shall be given to:

* * * * *

(4) Indebtedness which without a special privilege appear:

(a) In a public instrument.

(b) In a final judgment, should [it] have been the object of litigation.

These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments.

[4] Prudential filed a similar motion to intervene claiming a lien over the attached funds. Prudential's claim was dismissed by the district court; the court of appeals affirmed. See Pet. App. 16a-19a.

statute upon which petitioner relied, P.R. Laws Ann. tit. 31, § 5194 (1990), did not apply. The court noted that under petitioner's hypothesis, Section 5194 would render ineffective the FDIC's attachment. The court observed that "[t]he Supreme Court of Puerto Rico has consistently held * * * that [P.R. Laws Ann. tit. 31, § 5194 (1990)] does not supplant the standard rule that, as between two judgment creditors without other liens, the first creditor to attach has priority." Pet. App. 22a (citing *Oronoz*, 23 P.R.R. at 500, and *Puerto Rico Bedding*, 91 P.R.R. at 507). The court concluded that Section 5194(4) creates no statutory lien on property of the debtor and that a general judgment creditor must execute its judgment by attachment before claiming a priority. Accordingly, the court ruled that the FDIC's lien has priority over petitioner's unexecuted judgment. Pet. App. 23a-24a.[5]

ARGUMENT

Petitioner contends (Pet. 5-23) that the court of appeals erred in concluding that the first judgment creditor to attach a debtor's property gains priority under Puerto Rico law, and also erred when it found no evidence that the FDIC acted in bad faith by attaching the assets first. Neither contention merits this Court's review.

1. Petitioner errs in asserting (Pet. 11-23) that its unexecuted 1987 judgment has a statutory preference

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[5] The court declined petitioner's invitation to find *Oronoz* wrongly decided or mistranslated, since it lacked the authority to do so. Pet. App. 24a & n.13. The court of appeals also rejected as untimely petitioner's claim that the FDIC acted in bad faith in attaching the funds. The court noted that in any event it found no evidence in the record to support petitioner's allegations of bad faith on the FDIC's part. *Id.* at 24a n.14.

under Puerto Rico law, P.R. Laws Ann. tit. 31, § 5194 (1990), over the FDIC's 1989 judgment, which petitioner concedes (Pet. 23) was executed by attachment. In *Oronoz & Co.* v. *Alvarez*, 23 P.R.R. 497 (1916), the Supreme Court of Puerto Rico expressly rejected this argument:

> We have recently decided that mere priority in judgment gives the prior creditor no lien. *Auffant* v. *Succession of Manuel de J. Ramos et al.*, [23 P.R.R. 385 (1916)]. An attachment or other similar step is necessary to give the judgment a priority and *as between judgment creditors the first to attach has the priority*. It is a race of diligence. The priority of payments to which sections 1822 *et seq.* of the Civil Code[, P.R. Laws Ann. tit. 31, §§ 5191 *et seq.* (1990),] relate has no application to attachments.

Id. at 500 (emphasis added).[6] The Puerto Rico Supreme Court has consistently affirmed the *Oronoz* "first-to-attach" rule, as the courts below correctly noted. Pet. App. 22a, 40a; see *Puerto Rico Bedding Mfg. Corp.* v. *Herger*, 91 P.R.R. 503, 507 (1964) ("among common creditors the first one who attaches has preference over the others"); *Empresas Capote, Inc.* v. *Superior Court*, 3 P.R. Sup. Ct. Off'l Translations

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[6] Acknowledging that *Oronoz* is fatal to its claim, petitioner styles the case "an incorrect expression of the law," and postulates that the Puerto Rico Supreme Court meant its rule to apply only to "common," not "judgment," creditors. Pet. 15. On this point, the court of appeals correctly found, "we do not have the authority to declare *Oronoz & Co.* to be wrongly decided by the Puerto Rico Supreme Court or mistranslated by the official court translator, as [petitioner] urges us to do." Pet. App. 24a n.13.

1067, 1078-1079 (1975) ("It should be remembered that, grounded on the axiom *prior tempore portior jure*, even among common creditors, '* * * the first one who attaches has preferences over the others.'").[7] Under *Oronoz* the FDIC, as the first judgment creditor to attach, gained priority. As the court of appeals correctly determined, Section 5194 does not alter that result.[8]

2. Petitioner invokes the exercise of this Court's power of supervision over the FDIC's alleged bad faith concerning its attachment of the debtor's property. Pet. 5-10. Petitioner's principal complaint is that the FDIC twice "imped[ed] [petitioner] from executing a valid attachment order"; however, petitioner concedes that in each instance attachment was "barred by law." Pet. 7. Similarly, petitioner decries the FDIC's "squeeze[d-]in" attachment (*ibid.*), despite the fact that Puerto Rico law establishes a "race of diligence" between judgment creditors and encourages each to attach first. See *Oronoz*, 23 P.R.R. at 500. In this case, the FDIC simply won the

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[7] The First Circuit has also consistently recognized *Oronoz*'s "first-to-attach" rule. See *In re J.R. Nieves & Co.*, 446 F.2d 188, 193 (1st Cir. 1971); *Yumet & Co.* v. *Delgado*, 243 F. 519, 522 (1st Cir. 1917).

[8] As the court of appeals also correctly observed, certain Puerto Rico code provisions grant statutory preferences that act as the equivalent of statutory liens, but Section 5194 is not one of them. Cf. P.R. Laws Ann. tit. 31, § 5192(1) (1990) (essentially creating a seller's lien on personal property); *id.* § 5192(4) (lien for costs of transportation); *id.* § 5192(6) (lien on fruit crops in favor of creditor who provided seed). Since Section 5194 creates no such lien, a general judgment creditor must execute its judgment by attaching property, which petitioner failed to do in this case. Pet. App. 23a-24a.

race. Concerning petitioner's untimely bad faith allegation,[9] the court of appeals correctly determined that there was "no evidence in the record to support [petitioner's] allegations of bad faith on the FDIC's part." Pet. App. 25a n.14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner's allegation of bad faith was first raised in a motion to reconsider the district court's opinion. The court of appeals consequently declined to consider it. Pet. App. 24a n.14.